

LOOSENING THE CONFIDENTIALITY STRAITJACKET

TABLE OF CONTENTS

INTRODUCTION	1261
I. BACKGROUND.....	1264
A. <i>The History of Employer-Imposed Restraints</i>	1264
B. <i>The Modern Law of Employer-Imposed Restraints</i>	1267
1. <i>Confidentiality Agreements, Non-Competes & Other Restrictive Covenants</i>	1268
2. <i>Trade Secret Law, Intellectual Property & the DTSA</i>	1271
II. CONFIDENTIALITY AGREEMENTS UNFAIRLY DISADVANTAGE EMPLOYEES & GENERATE SIGNIFICANT ECONOMIC COSTS	1273
A. <i>Doctrinal Tension with Trade Secret Law</i>	1274
B. <i>Confidentiality Agreements Chill Behavior in the Workforce</i>	1276
C. <i>Negative Impacts on Equality</i>	1279
D. <i>The Need to Protect Business Information Does Not Justify Current Law</i>	1281
III. REFORMING EXISTING LAW	1284
A. <i>A Return to First Principles</i>	1284
B. <i>Reform Proposals</i>	1286
CONCLUSION	1287

INTRODUCTION

In May 2024, the Federal Trade Commission (FTC) finalized its rule invalidating most non-competition agreements for approximately thirty million workers across the United States.¹ While the regulation has been formally abandoned by the FTC,² it represented the most aggressive antitrust action ever taken by the federal government against non-

1. See Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (codified at 16 C.F.R. pt. 910) (“[T]he Commission estimates that approximately one in five American workers . . . is subject to a non-compete.”).

2. Press Release, Fed. Trade Comm’n, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sept. 5, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule> [https://perma.cc/PT7V-NP9W]. The rule had been languishing under an injunction since August 2024. See *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369, 384 (N.D. Tex. 2024) (holding that “the FTC lacks the authority to create substantive rules” under Section 6(g) of the Administrative Procedure Act).

competition agreements, or “non-competes.”³ The rule has provoked much discussion about the legality and desirability of non-competes.⁴ In the midst of this debate, the continued desirability of other types of restrictive covenants has been overlooked. Over half of American workers are subject to confidentiality agreements that restrict the way they can use or divulge information.⁵ The ubiquity and scope of confidentiality provisions often make them just as economically restrictive as non-competes, and these agreements operate as an informational “straitjacket” that prevents workers from using their skills productively, changing jobs, or voicing concerns about the workplace.⁶

Following the demise of the FTC’s non-compete rule, antitrust enforcement appears to be closed off as a remedy to the harms of non-competes (much less confidentiality agreements). This Note argues that contract law remains available as an avenue through which public policy could be revitalized to protect workers in the making of contracts.⁷ Despite the fact that restraints by contract have deleterious effects on the workforce, confidentiality agreements remain understudied in the literature and generally receive less judicial scrutiny than non-competes.⁸ The traditional rationale for confidentiality agreements is that they are necessary to protect valuable proprietary information possessed by firms. This is an important policy interest, but agreements which purport to merely restrain the disclosure or use of information often constrain the freedom and mobility

3. See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 628 (1960) (antitrust law was “apparently never called into play” against restraints by contract imposed on employees by their employers).

4. See, e.g., Michael K. Molzberger, *The Proposed Nationwide Ban on Non-Competition Agreements by the Federal Trade Commission*, 43 FRANCHISE L.J. 1 (2024); Eyasu Yirdaw, *Preventing the Noncompete Apocalypse: Why the FTC Has It Wrong*, 5 CORP. & BUS. L.J. 124 (2024); Stephen Fox, Comment, *Breaking the Non-Compete Cycle: A Legal and Economic Analysis of the FTC’s Power Move*, 92 U. CIN. L. REV. 607 (2023); Jared Yaggie, Comment, *An Unfair Method of Rulemaking: An Application of Constitutional Doctrines that Oppose the FTC Rule Banning Non-Competition Agreements*, 92 U. CIN. L. REV. 929 (2024).

5. Jason Sockin, Aaron Sojourner & Evan Starr, *Non-Disclosure Agreements and Externalities from Silence* 1, 4 (Upjohn Inst. Working Paper, Paper No. 22-360, 2025).

6. Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1564 (2018) (arguing that contract law’s subversion of trade secret requirements negatively impacts innovation); Sockin et al., *supra* note 5, at 4–5; Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781, 790–92 (2020) (arguing that a combination of several restrictive clauses creates “ironclad” exit and voice penalties for employees).

7. See *infra* Section III.A.

8. Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 YALE L.J. 669, 674–75 (2024). In recent years, the legal community has begun to take notice that “broadly drafted confidentiality agreements can operate like noncompetes”—notably, the sweep of the FTC’s non-compete ban included NDAs which act as “de facto” non-compete clauses. *Id.* at 677–78.

of employees to an extent just as great as non-competes.⁹ Reforming the law to narrow the scope of confidentiality agreement enforcement would not threaten the ability of businesses to protect the most valuable proprietary information, which is largely protected through other areas of law.¹⁰

This Note explores existing law on confidentiality agreements and trade secrets as well as how the common-law origins of post-employment contractual restraints developed over time, which historically focused on non-competes.¹¹ It will then argue that confidentiality agreements have several negative externalities. Even when confidentiality agreements are left unenforced, their expansive scope and presumptive validity have significant chilling effects on information sharing in the economy that negatively affects innovation, labor market sorting, and employee mobility.¹² The “mere insertion” of a non-disclosure agreement (NDA) has a significant chilling effect on the ability of workers to voice concerns¹³ or leave their company to get a new job, particularly if the NDA is in conjunction with other restrictive clauses.¹⁴ These agreements seriously limit the opportunities and bargaining power of workers, particularly those who are specialists in technical industries.¹⁵ Confidentiality agreements also have unequal effects across demographics and threaten to entrench existing inequality in the workforce.¹⁶ Consequently, under current law, confidentiality agreements contribute to large firms’ social control of the workforce and allows them to effectively sever knowledge and human capital from employees for an indeterminate amount of time and with unlimited geographic scope.¹⁷

9. *Id.* at 739 (arguing employers should be required to show a non-disclosure agreement is not a “de facto noncompete”).

10. *See infra* Section I.B.2. The Defend Trade Secrets Act, passed by Congress in 2016, was motivated by fears of cyberespionage and intellectual property theft, but ironically, the Act probably had little impact. *See infra* notes 85–88 and accompanying text.

11. *See infra* Part I.

12. Lobel, *supra* note 6, at 792.

13. While not the focus of this Note, the literature connecting non-disclosure agreements with the suppression of reports of sexual harassment and other misconduct in the workplace is extensive. *See, e.g.,* Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507. This kind of misconduct might be related to the economic restrictiveness of confidentiality agreements and merits further research. *See* Lobel, *supra* note 6, at 801 (discrimination in the workplace reduces women’s bargaining power in recruitment and employment).

14. Lobel, *supra* note 6, at 792. It is common practice for employers to include, in every contract, a mix of non-compete clauses, customer and coworker non-solicitation clauses, NDAs, innovation assignment clauses, holdover clauses, pre-dispute arbitration clauses, choice of law clauses, and reformation and liquidated damages clauses. *Id.*

15. *Cf.* Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 698 (2011); *see also infra* Section II.B.

16. *See infra* Section II.C.

17. *See infra* note 126 and accompanying text.

More generally, this Note posits that a conceptual realignment is needed and discusses several policy proposals which address shortcomings in existing law.¹⁸ This Note contributes to the contracts and employment law literature as well as to the broader law-and-political-economy literature by investigating the traditional legal rationales behind these agreements, suggesting that undue deference has been given to employers in determining how and when information may be privileged.¹⁹

I. BACKGROUND

A. *The History of Employer-Imposed Restraints*

The earliest examples of restraints on employee conduct post-employment emerged centuries ago in the context of the guild system of artisans and craftsmen.²⁰ The agreements were covenants between a journeyman or apprentice and a master to not compete with the master. The common law considered these agreements “‘unethical’ . . . attempt[s] to prolong the traditional period of subservience of an apprentice or journeyman [that] interfere with his traditional rights to enter the guilds as a craftsman, in violation of guild custom.”²¹ The primary rationale of courts invalidating such restraints was a concern about how the covenants limited the ability of aspiring craftsmen to become full members of professional guilds.²²

As Harlan M. Blake explained in his seminal paper on non-competes, *Mitchel v. Reynolds*²³ is the case most illustrative of the early approach in England.²⁴ At dispute in *Mitchel* was not an employment relationship but an agreement by a baker to “not practice his baker’s art” in the area for the term of a lease of his shop.²⁵ The judge, Lord Macclesfield, held that the “presumption that all restraints of trade are invalid” was overcome because the evils which such a presumption addresses were not present in the case.²⁶ Those evils were the potential for “mischief” that may result from the loss

18. See *infra* Part III.

19. Law-and-political-economy scholars argue that existing contract law “prizes a certain version of efficiency over all else” and contributes to the “depoliticization and naturalization of market-mediated inequalities.” Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1789–90 (2020).

20. See Blake, *supra* note 3, at 631–34.

21. *Id.* at 632.

22. See *id.*

23. (1711) 24 Eng. Rep. 347; 1 P. Wms. 181.

24. Blake, *supra* note 3, at 629.

25. *Id.*

26. See *id.*

of a workers' livelihood and income, and the public's loss of a useful worker.²⁷ However, the presumption of invalidity was overcome because striking down the agreement risked "unnecessary hardship" for the craftsman who was prepared to intelligently give up his trade for a limited time in exchange for fair value.²⁸ Unlike in the employment context, the risk of "great abuses" from masters was not present where the baker was receiving valuable consideration for the lease.²⁹

The common-law basis for scrutinizing employer-imposed restraints on trade was arguably to "encourage trade" in England and prevent tradesmen from being induced into giving up their livelihoods.³⁰ That said, in the early eighteenth century, when "craft guilds were the dominant vehicles of economic activity," the reasoning in non-compete cases rested upon maintenance of a more traditional economic model, not the modern ideas of freedom of contract or economic mobility.³¹ So, while combatting the monopolization of trade was one motivation for early judicial decisions, the primary purpose of invalidating restraints was not to further a free-market system but to sustain the guild economy of the Renaissance period.³²

By the end of the nineteenth century, the two primary purposes for invalidating employer restraints—mischief done to the worker and to the public—seemingly remained the same but were applied to very different social and economic circumstances. By the time of *United States v. Addyston Pipe & Steel Co.*, courts were more concerned with the threats faced by monopolization on a national scale and not the decidedly more local concerns contemplated by *Mitchel v. Reynolds*.³³ Lord Macclesfield famously stated that "general restraints" which prohibit an employee's practice of a trade anywhere in the country were always unlawful because they had no practical logic: "[F]or what does it signify to a tradesman in

27. *Id.*

28. *Id.* The non-compete restriction lasted only for the duration of the lease. *Id.*

29. *See id.* The court reasoned that the risk of abuse was greater in employment agreements because masters might be motivated to restrict their apprentices' future abilities to run businesses competitive with their own. *See id.* at 629–30. A more modern rationale for why there is greater risk of abuse when bargaining over employment is that the worker is receiving only wages in return for their labor, *plus* the covenant not to compete.

30. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) ("[B]y such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor.").

31. *See Blake*, *supra* note 3, at 632–33 (noting such early cases "cannot fairly be described as indicative of an attitude of economic liberalism").

32. *Id.* at 637. Blake draws a distinction between late-nineteenth-century cases and earlier case law, the latter of which was primarily concerned with sustaining the feudal "guild" system for masters and apprentices. *Id.* The notion that early courts endorsed "freedom of contract" as a dominant principle is at best a revisionist recharacterization of these opinions. *See id.*

33. *See id.* at 637–38.

London, what another does in *Newcastle*?”³⁴ The distinction in *Mitchel* which made the agreement permissible was that the baker had only given up his livelihood temporarily in exchange for value.³⁵ Under those circumstances, the risks of hardship to the covenantor were quite limited; the baker leasing his shop could live on the rents received under the lease, and as soon as the term ended, he would be free to practice his craft once more.³⁶

The rule set down in *Mitchel* was consistently applied at first but gradually modified over the years. In *Horner v. Graves*, the court held that the validity of an employer-imposed restraint turned on whether the agreement is (1) limited to “fair protection” of the employing party’s interest and (2) not so extensive that it undermines the public interest.³⁷ The court concluded that a non-compete imposed on a dental assistant to not practice his craft within 100 miles of his employer was “unreasonably broad” and unenforceable under the circumstances.³⁸

In the late nineteenth century, courts began to incorporate laissez-faire economic theories into their jurisprudence. In influential cases, English judges fixated on the liberty of contract and began upholding nearly all restrictive employment covenants.³⁹ An emblematic statement of this judicial attitude was made in an 1875 case:

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.⁴⁰

So it was that until about 1913, English courts applied “a rigorous freedom-of-contract approach to *all* restraint cases,” despite the fact it was

34. *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347, 350, 1 P. Wms. 181, 190–91.

35. *Blake*, *supra* note 3, at 629. The agreement was more akin to a business-to-business agreement than to a classic employment covenant to not compete. See *infra* notes 65–66 and accompanying text.

36. See *Blake*, *supra* note 3, at 629.

37. (1831) 131 Eng. Rep. 284, 287; 7 Bing. 735, 743.

38. *Blake*, *supra* note 3, at 639–40 (describing the case’s holding).

39. *Id.* at 640.

40. *Id.* at 640–41 (emphasis added) (quoting *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)).

clearly erroneous even under English precedent.⁴¹ The House of Lords established in an 1894 case that the restraint of trade doctrine was not unitary, echoing the findings of *Mitchel* that “different considerations must apply” in cases concerning contracts “between master and servant or between an employer and a person seeking employment.”⁴²

By the twentieth century, the law developed to modify this rule and began to explicitly distinguish between non-compete agreements incident to an employment agreement and those incident to a business relationship.⁴³ Covenants not to compete post-employment became more common as economic growth progressed, and disputes concerning non-competes arose more frequently in litigation.⁴⁴ As such, a new rule took shape establishing that a post-employment non-compete agreement must have a “legitimate business interest” that justifies the restraint on the employee.⁴⁵ A prominent justification for restraints was the need to protect the employer’s confidential information, such as customer lists or other trade secrets.⁴⁶

B. The Modern Law of Employer-Imposed Restraints

The privileges and protections that an employer may claim against actions by an employee (or former employee) can be placed into a few rough categories. First, there are post-employment contractual restrictions on a worker’s behavior in future employment, like non-competes and confidentiality agreements. Second, trade secret law privileges the disclosure or use of certain proprietary information owned by a business even in the absence of a contract.⁴⁷ In 2016, Congress enacted the Defend Trade Secrets Act (DTSA), adding a federal layer to the latticework of state

41. *Id.* at 642–43 (emphasis added).

42. *Id.* at 642 (quoting *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A.C. 535 (HL) 566 (appeal taken from Eng.), *affirming* [1893] 1 Ch. 630 (C.A. 1892)) (noting the difference between business-to-business contracts and employment contracts).

43. Sharon K. Sandeen & Elizabeth A. Rowe, *Debating Employee Non-Competes and Trade Secrets*, 33 SANTA CLARA HIGH TECH. L.J. 438, 444 (2017); Blake, *supra* note 3, at 646 (noting that, by 1960, the courts were “in almost universal agreement that the restraint-of-trade doctrine is not unitary”). Most courts would apply a substantively different legal approach to employee restraints than other types of restraints on trade. *See id.*

44. *See id.* at 638.

45. Sandeen & Rowe, *supra* note 43, at 445.

46. *Id.* at 446. For example, the *Restatement (First) of Contracts* stated that a non-compete will usually not be enforceable unless the employees’ services are “unique,” or the agreement is necessary to “prevent the use of trade secrets or lists of customers.” *Id.* (quoting RESTATEMENT (FIRST) OF CONTRACTS § 516(f) (AM. L. INST. 1932)).

47. *See* Varadarajan, *supra* note 6, at 1550–53 (discussing the key characteristics of trade secret law). *See generally* UNIF. TRADE SECRETS ACT (UNIF. L. COMM’N 1985) (establishing a uniform body of trade secret law in states that have adopted it).

trade secret regimes.⁴⁸ Third, intellectual property law establishes rules for copyrights, patents, and trademarks, which typically contain more formal requirements.⁴⁹

Finally, confidentiality agreements implicate federal antitrust law, though it has never been seriously used to invalidate contractual employment restraints.⁵⁰ The possibility of antitrust enforcement was briefly revived by the FTC's 2024 rule prohibiting non-competes, but it is debatable whether it had the legal authority to do so.⁵¹ These overlapping legal regimes are complementary but also at times serve duplicative functions.⁵² Each legal regime will be described briefly, followed by discussion of how they function in combination.

1. Confidentiality Agreements, Non-Competes & Other Restrictive Covenants

The two most common types of contractual restraints are non-compete agreements and confidentiality agreements, which function as contractual restrictions on the use or disclosure of information.⁵³ Non-compete agreements are contractual provisions that “prevent an individual from pursuing a trade or profession,” while confidentiality agreements encompass any agreement which prohibits a more limited set of behaviors, such as “disclosure or use of confidential information or the solicitation of clients.”⁵⁴ For purposes of this Note, the term “confidentiality agreement” refers to all kinds of contractual promises to not disclose *or use* information deemed confidential.⁵⁵ Included in this category are non-disclosure

48. Varadarajan, *supra* note 6, at 1550–51; see David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105 (2018) (discussion of the DTSA).

49. *E.g.*, Varadarajan, *supra* note 6, at 1554 (patents require registration with the Patent & Trademark Office).

50. *See supra* notes 2–3.

51. In its justification of the rule, the FTC may have overstated the extent to which *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), endorses a conclusion that non-competes are unlawful restraints of trade. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024). In *American Tobacco*, the Court held that several companies violated antitrust laws and included among its many reasons the fact that “manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future.” 221 U.S. at 183. The presence of non-competes for employees was just one of many factors; the Court expressly stated it was not considering whether the non-competes were lawful when “isolatedly viewed.” *Id.*

52. Sandeen & Rowe, *supra* note 43, at 443, 449–50 (detailing how common-law restraints of trade, trade secrets regulation, and other statutory reforms coexist at state and federal levels); *see also infra* Section II.A.

53. *See* Hrdy & Seaman, *supra* note 8, at 683 (“Confidentiality agreements are extremely common in the workplace.”); Sandeen & Rowe, *supra* note 43, at 442–43.

54. Sandeen & Rowe, *supra* note 43, at 443.

55. *See* Hrdy & Seaman, *supra* note 8, at 682.

agreements, non-disparagement agreements, innovation assignment clauses, general secrecy policies, and other agreements that are crafted toward restricting particular information.⁵⁶ Importantly, a characteristic all these agreements share is they operate as “exit constraints” which disincentivize employees from speaking up or leaving their workplace.⁵⁷

The ability to restrict employees’ use of information has been traditionally regulated at the state level under the common law and by statute.⁵⁸ Confidentiality agreements can arise as part of an employment agreement or as part of a business-to-business agreement.⁵⁹ NDAs are the most common type of confidentiality agreement found in the United States, and by one estimate are used by nearly ninety percent of firms, covering more than half of the workforce.⁶⁰ Confidentiality agreements are virtually ubiquitous and may even be increasing in frequency for all types of employees.⁶¹ The agreements have a number of effects on employee behavior and stem from a variety of motives by employers. The primary justification given for both non-competes and confidentiality agreements is the employer’s interest in maintaining trade secrets, confidential business practices, and other confidential information.⁶² Other reasons given are that restrictive covenants maximize returns on human capital investment by retaining employees long-term and minimizing the degree of competition by other firms.⁶³

As discussed in Section I.A, the law in the twentieth century continued to distinguish between employer restraints on an employee’s services and other restraints on trade, relying on *Mitchel v. Reynolds*.⁶⁴ Courts tend to scrutinize post-employment restraints more closely because there is greater

56. See Lobel, *supra* note 6, at 781–82.

57. *Id.* While not technically a restriction on *information*, another powerful exit restraint employers can use is mandatory arbitration. *Id.*

58. Jacqueline A. Carosa, *Employee Mobility and the Low Wage Worker: The Illegitimate Use of Non-Compete Agreements*, 67 BUFF. L. REV. DOCKET, Dec. 2019, at D1, D15 (noting that non-competes are regulated by the states); see also Sandeen & Rowe, *supra* note 43, at 449–50 (documenting recent state efforts at regulating non-competes); Varadarajan, *supra* note 6, at 1544–45 (noting that laws governing intellectual property of various types also have complicated interrelationships with trade secret law and contract law).

59. Hrdy & Seaman, *supra* note 8, at 682–83.

60. Sockin et al., *supra* note 5, at 1, 4.

61. See Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 20–21 (2015).

62. Donald J. Polden, *Restrictions on Worker Mobility and the Need for Stronger Policies on Anticompetitive Employment Contract Provisions*, 33 COMPETITION 128, 131 (2023) (published by the Antitrust and Consumer Protection Section of the California Lawyers Association).

63. See *infra* note 159 and accompanying text. There is better evidence the agreements contribute to employee retention by acting as an exit restraint. See *infra* Section II.B.

64. Blake, *supra* note 3, at 646–48. Most courts agreed the “restraint-of-trade doctrine is not unitary” because the purposes, public policy needs, and nature of transactions will differ. *Id.* at 646.

risk of unequal bargaining power between employer and employee; after all, greater harm will come to an employee who has “improvidently given up his only valuable economic asset.”⁶⁵ Business-to-business agreements receive a more deferential presumption of reasonableness, which is appropriate where there is a mutual exchange of proprietary information by parties with equivalent bargaining power.⁶⁶ In such a context, contractual assurances against disclosure or use of information are more obviously necessary to execute deals between firms of relatively equal sophistication.⁶⁷ Confidentiality agreements between an employee and employer, however, implicate a very different type of economic relationship which triggers different legal and equitable considerations.⁶⁸

The common-law rule which prevails to this day is that virtually any type of information can be deemed confidential if it is agreed to be confidential via contract.⁶⁹ The most common confidentiality agreement, the NDA, is relatively easy to enforce but must be reasonably limited in scope so that it is tailored to the protection of legitimate business interests.⁷⁰ While there is not total consensus, courts “routinely give confidentiality agreements ‘more favorable treatment’ than noncompetes.”⁷¹ The traditional rule is that confidentiality agreements, which in theory only restrict information, are substantively different from non-compete agreements and therefore receive less judicial scrutiny.⁷²

In contrast to confidentiality provisions, a non-compete agreement forbids an employee from working in a particular trade or profession.⁷³ Non-competes differ from confidentiality agreements insofar as the latter only

65. See *id.* at 647–48. The same risks are present for all types of confidentiality agreements, not just non-competes. Hrды & Seaman, *supra* note 8, at 683.

66. Varadarajan, *supra* note 6, at 1577 (explaining that, in this context, such contracts more closely adhere to the “ideal assumptions behind a ‘bargained contract’” (quoting Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1286 (1995))).

67. See Hrды & Seaman, *supra* note 8, at 682–83. Each side in a business-to-business agreement will invariably have representation by qualified attorneys. *Id.*

68. For example, NDAs and especially “no representation” provisions used for merger and acquisitions (M&A) transactions are likely to be strictly enforced out of belief it is best for the parties and for efficient capital markets. Byron F. Egan, *Confidentiality Agreements Are Contracts with Long Teeth*, 46 TEX. J. BUS. L. 1, 2 (2014).

69. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 637 (1999) (citing cases from various jurisdictions).

70. See Bishara et al., *supra* note 61, at 21. As a matter of common law, there may be liability for divulging confidential information even without a written NDA. *Id.*

71. Hrды & Seaman, *supra* note 8, at 676 (citation omitted). Even in states that evaluate NDAs like non-competes, they do so with “less concern on limiting the scope of the restriction.” Bishara et al., *supra* note 61, at 21–22.

72. Hrды & Seaman, *supra* note 8, at 707–08.

73. Sandeen & Rowe, *supra* note 43, at 443. Like other contractual covenants, non-competes are governed by state contract law principles. See Carosa, *supra* note 58, at D12, D15 (noting the reluctance of states to apply antitrust law to non-competes even under state antitrust law).

prohibit “discrete behaviors,” such as the disclosure or solicitation of information.⁷⁴ Unlike confidentiality agreements, the mere fact that an employee works for another company in the same kind of business may be prohibited under the agreement. Since the days of *Mitchel v. Reynolds*, courts have acknowledged the existence of unequal bargaining power and generally require non-competes to be reasonably limited in terms of duration, geographic scope, and activity prohibited for the former employee.⁷⁵ Since non-competes and NDAs sometimes have similar functions, the analytical distinction separating non-competes and confidentiality provisions is blurred and often of questionable use in adjudicating whether a particular contractual restraint is lawful.⁷⁶

2. Trade Secret Law, Intellectual Property & the DTSA

The concept of trade secrets confers to businesses a legal device to privilege valuable information from disclosure if the information meets certain criteria.⁷⁷ Trade secret law historically emerged as an organ of state tort law and provides a cause of action when an individual divulges a protected secret to a third party.⁷⁸ For decades, trade secret law has not varied among the states to any significant extent because of widespread adoption of the Uniform Trade Secrets Act (UTSA).⁷⁹ In general, a protectible “trade secret” under the common law existed if the employer’s information was (1) proprietary in nature, (2) held in confidence, and (3) not of general knowledge.⁸⁰ A trade secret could be protected for potentially forever—as long as the information remains outside of the public’s knowledge.⁸¹

Trade secrets infringement is not so cut and dry in the context of an employee as it is in a commercial business arrangement, and it was the latter of which the early trade secret cases focused upon.⁸² The duty for employees to protect their employers’ trade secrets is more complicated because it must balance three principles: (1) the need to protect the employer’s investments

74. Sandeen & Rowe, *supra* note 43, at 443.

75. Blake, *supra* note 3, at 675.

76. Hrды & Seaman, *supra* note 9, at 674 n.12 (“The label of ‘nondisclosure agreement’ is often misleading because these contracts typically prohibit unauthorized use as well as disclosure.”); Sandeen & Rowe, *supra* note 43, at 443 (noting that some agreements are “mislabelled” as one or the other).

77. See David R. Hannah, *Should I Keep a Secret? The Effects of Trade Secret Protection Procedures on Employees’ Obligations to Protect Trade Secrets*, 16 ORG. SCI. 71, 71 (2005).

78. See Varadarajan, *supra* note 6, at 1549.

79. *Id.* at 1550. The UTSA has been adopted by forty-seven states, the holdouts being New York, North Carolina, and Massachusetts. *Id.* at 1550 n.29.

80. Bast, *supra* note 69, at 633–34.

81. Hannah, *supra* note 77, at 73.

82. Sandeen & Rowe, *supra* note 43, at 445.

in productive information; (2) the employee's interest in "gainful employment"; and (3) "the public's interest in ensuring commercial morality."⁸³ Whether or not the information is of general knowledge and therefore not a protectible trade secret is frequently difficult to determine.⁸⁴

Further complicating things, Congress enacted the Defend Trade Secrets Act (DTSA) in 2016.⁸⁵ Motivated by a perceived rise in cyberespionage, trade secrets theft, and "litigation inefficiencies" under state laws, its primary effect was empowering plaintiffs to bring civil actions in federal court for trade secret misappropriation.⁸⁶ The DTSA imported most of the foundational trade secret principles from the UTSA but contains some differences with respect to remedies.⁸⁷ Interestingly, it contains a provision preventing a federal court from issuing an injunction that would prevent a worker from working for a different employer, even in states which allow non-compete agreements.⁸⁸

Whether information is of a "general character" depends on how accessible that information is absent the employment relationship.⁸⁹ In *Ingersoll-Rand Co. v. Ciavatta*,⁹⁰ the New Jersey Supreme Court enforced an intellectual property agreement against Ciavatta, an engineer who had invented a new competitive product on his own time, because his "knowledge of the underground mining industry was based entirely on his employment experience with Ingersoll-Rand," and he had been "enriched . . . by his access to Ingersoll-Rand's 'information, experience, expertise and ideas.'"⁹¹ Whether an idea is a "trade secret" or is simply general

83. Bast, *supra* note 69, at 635 (citing *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 892 (N.J. 1988)).

84. Blake, *supra* note 3, at 672 (discussing the difficulty of determining the circumstances under which scientific, technical or creative information can be considered trade secrets).

85. Levine & Seaman, *supra* note 48, at 107, 119.

86. *Id.* at 116–17.

87. *See id.* at 119. The fact that the DTSA is closely modeled after the UTSA has led some scholars to conclude it will most likely be interpreted in a similar manner to the UTSA. *See id.* at 119 n.66 (citation omitted).

88. Sandeen & Rowe, *supra* note 43, at 450–51. It is unclear if this was intended, but the text provides that injunctive relief can be granted *only if* it would not:

(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation, and not merely on the information the person knows; or

(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business.

18 U.S.C. § 1836(b)(3)(A)(i)(I)–(II).

89. Bast, *supra* note 69, at 634 n.29 (noting that publicly available information or information accessible through independent investigation is of general character).

90. 542 A.2d 879 (N.J. 1988).

91. *Id.* at 884–85. The agreement in question was a "holdover" agreement, where employees agree that their employer owns inventions they create within a year of the termination of their employment if the invention was created because of "work done during such employment." *Id.* at 885.

knowledge learnable by anyone in their profession is a crucial issue. Knowledge of a general character is not typically protectible, but it is more likely to be regarded as protected if the knowledge is specifically mentioned in a confidentiality agreement.⁹²

Lastly, intellectual property law confers specific protections to owners of “information-based goods”⁹³ and is directly regulatable by Congress under the Constitution.⁹⁴ Inventions, patents, and copyright grant innovative individuals “limited rights to exclude” others from using their creations.⁹⁵ Similar to trade secret law and confidential information law, intellectual property law represents another avenue through which firms may protect commercially important ideas. Intellectual property law confers something analogous to a property interest in a particular idea.⁹⁶ By contrast, trade secrets do not necessarily confer an exclusive right to possess or use secret ideas.⁹⁷ Information protectible as intellectual property is also subject to tougher requirements and contains less overlap with confidential information.⁹⁸

II. CONFIDENTIALITY AGREEMENTS UNFAIRLY DISADVANTAGE EMPLOYEES & GENERATE SIGNIFICANT ECONOMIC COSTS

Existing law governing confidentiality agreements has failed to keep up with changing conditions and permits an excessive and inequitable degree of contractual constraint on workers. There is substantial economic literature suggesting that the usage of confidentiality restrictions has increased and become more expansive.⁹⁹ While NDAs received a lot of negative attention following the #MeToo Movement, courts still generally rubberstamp confidentiality provisions in employment contracts.¹⁰⁰ A closer

92. See *infra* notes 111–12 and accompanying text.

93. Varadarajan, *supra* note 6, at 1549.

94. U.S. CONST. art. I, § 8, cl. 8.

95. Varadarajan, *supra* note 6, at 1549 n.17. Trade secret law today is regarded as a species of intellectual property, but it differs from other forms of intellectual property in that trade secret doctrine involves “morality-based rationales” that seek to standardize “commercial ethics.” *Id.* at 1550.

96. Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 725 (2009).

97. Cf. Varadarajan, *supra* note 6, at 1549 (noting that patent and copyright holders may be granted a “period of exclusivity”). Historically, some cases suggested that companies had a property interest in their trade secrets, but trade secrets are not protectible when a third party discovers them independently of the putative trade secret holder. See Bast, *supra* note 69, at 633–34 (explaining that there is no trade secret if the information is generally known by others or not held in confidence).

98. See *infra* Section II.A.

99. See *supra* notes 60–61 and accompanying text.

100. Hrđy & Seaman, *supra* note 8, at 708 (noting that “common wisdom” among many courts is to “rubberstamp confidentiality provisions”).

look reveals that zealous enforcement of NDAs and other confidentiality agreements is contrary to public policy.¹⁰¹

Confidentiality agreement enforcement creates a significant chilling effect on workers, giving firms an unsettling degree of social control of the workforce. First, the doctrinal overlap between trade secret law and contract law creates tension between the two and enhances the overall effect of both enforcement regimes. Second, the imbalance of bargaining power between the parties inherent in every employment contract means that confidentiality agreements create a strong chilling effect on employee behavior. This power differential exploits the fact that an employee's knowledge and expertise is central to the value of their human capital, particularly for technical and professional workers.¹⁰² Third, the chilling effects on workplace freedom fall unequally across demographics, creating a risk of entrenched stratification in the workforce along gender and racial lines. Fourth, the conventional wisdom that strict confidentiality enforcement is necessary to protect firms and enhance economic growth is overblown. Reforms consistent with those suggested in this Note will not negatively affect the ability to monetize novel trade practices.

A. Doctrinal Tension with Trade Secret Law

An initial problem stems from the significant practical and doctrinal overlap between the law of restrictive covenants and trade secret law.¹⁰³ Deepa Varadarajan has persuasively argued that the strategic use of contracts “to evade trade secret law’s requirements and limitations . . . creates doctrinal tension between contract law and trade secret law.”¹⁰⁴ More specifically, the interplay between confidentiality agreements and trade secret law raises several practical problems that undermine the underlying policy purposes of both doctrines.¹⁰⁵ First, there is increasing awareness that at least the broadest NDAs are not appropriately entitled to

101. See Polden, *supra* note 62, at 131. Many of the usual justifications for restrictive covenants are part of the “cost of doing business, not . . . legitimate justification[s] for imposing employment terms that lock employees into service to one employer or curb[] their ability to move to better jobs.” *Id.*

102. Cf. Marx, *supra* note 15, at 697. Skilled technical and professional workers only seem “less vulnerable to exploitation” because of the false presumption of inseparability of human capital and labor. *Id.*

103. See Varadarajan, *supra* note 6, at 1563–64.

104. *Id.* at 1563.

105. Firms use contracts to evade and expand trade secret law in four ways: “(1) to enlarge protectable subject matter; (2) to avoid ongoing reasonable secrecy precautions; (3) to eliminate the reverse engineering defense; and (4) to impose non-compete clauses that circumvent trade secret requirements and limits altogether.” *Id.* at 1563–64. This Note argues that all these mechanisms boil down more simply to one problem: Contractual restraints allow a much greater scope of protectible information than trade secret law does.

the deference they receive because they protect information far beyond trade secrets.¹⁰⁶ Many NDAs are so totalizing and invasive that they function like non-competes and should be treated with the same degree of scrutiny.¹⁰⁷ Second, existing literature gives little attention to the overlapping nature of the various information protection regimes.¹⁰⁸ The end result is that business information is overprotected at every level in terms of the restricted subject matter, the degree of restriction, and the ensuing chilling effect on employee behavior.¹⁰⁹ Instead of protecting only the most valuable employer information which merits a legal remedy for the employer, the interaction between confidentiality agreements and trade secret law has fastened an informational straitjacket on workers. This doctrinal tension is best reconciled through a holistic analysis of how confidentiality provisions are used to enforce trade secret claims in the courts.¹¹⁰

Trade secret law and confidentiality agreements rely significantly on each other in practice, representing mutually reinforcing regimes for protecting private information. Trade secret claims and contractual claims are a potent combination because they are overlapping causes of action: The duty to maintain the employer's secret—an element of the trade secret claim—can be established through an “express confidentiality agreement” signed by the worker.¹¹¹ In litigation about whether a particular piece of information is “secret” or “confidential,” the existence of a non-disclosure agreement is often dispositive.¹¹² Securing an employee NDA is a mere formality; confidentiality agreements are rarely regarded as suspect by the courts, so judges routinely enforce them as written regardless of their scope. The result is that NDAs allow firms to evade and expand trade secret law beyond its delimited legal boundaries.¹¹³ When a firm sues a former employee, even if they fail to persuade the court that the information was a

106. Hrды & Seaman, *supra* note 8, at 712–14 (identifying courts that have invalidated NDAs that privilege general knowledge beyond what is protectible as a trade secret).

107. *Id.* at 678.

108. Varadarajan, *supra* note 6, at 1546 (“Largely absent from this voluminous literature is . . . trade secret law’s complicated interaction with contract law.”). *But see* Hrды & Seaman, *supra* note 8, at 674 (characterizing the literature on the intersection of non-compete law and trade secret law as “vast”). The intense focus of literature on non-competes reinforces Hrды and Seaman’s point that confidentiality agreements, in contrast, have “fallen under the radar.” *Id.*

109. *See* Blake, *supra* note 3, at 651 (recognizing that a “restraint tailored to protect against circumstances when maximum damage could be done will necessarily ‘over-protect’ most of the time”).

110. *See* Varadarajan, *supra* note 6, at 1577 (endorsing a “nuanced approach” that “recognizes the realities of the contracting process and the status of the parties”).

111. Hrды & Seaman, *supra* note 8, at 686–87.

112. *See, e.g.,* J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 260 N.E.2d 723, 730 (Mass. 1970) (explaining that a crucial fact showing the knowledge in question was not a trade secret was company’s failure to have employees sign non-disclosure agreements).

113. Varadarajan, *supra* note 6, at 1563–73.

trade secret and not of general knowledge, the firm might easily prevail under a breach of contract theory.¹¹⁴

Although trade secret law and contract law are intertwined, the effect that the two doctrines have paired together is not properly accounted for in modern jurisprudence. What it lacks is due consideration for the inequities arising from the bargaining asymmetry in the formation of employment contracts.¹¹⁵ Special policy implications arise where the existence of a confidentiality agreement is also conclusive evidence of the existence of a trade secret claim that would have otherwise been unprovable.¹¹⁶ By viewing the two issues separately (Is there a trade secret? Is there an enforceable confidentiality provision?), courts overlook the multiplicative effect the doctrines have in combination.¹¹⁷ Of course, it is not necessarily a concern if a single occurrence gives rise to multiple overlapping claims for one party, but it is troubling that the law stacks avenues toward legal relief in favor of the employer against their relatively disempowered employees.

B. Confidentiality Agreements Chill Behavior in the Workforce

Confidentiality agreements unfairly disadvantage workers due to the fundamental imbalance of power between employer and employee.¹¹⁸ It is typical for the whole range of possible restrictions to be combined into a single employment contract, which substantially chills employee behavior.¹¹⁹ This supercharges incentives toward conformity among employees, pushing them toward a culture of obedience. Discussion of NDAs is replete with references to how they foster a culture of “silence,” but these agreements also foster a culture of compliance.¹²⁰ The combination of exit restrictions fosters an environment where workers cannot freely choose to leave and must continue working in undesirable

114. Hrdy & Seaman, *supra* note 8, at 685.

115. Varadarajan, *supra* note 6, at 1574.

116. Bast, *supra* note 69, at 702 (arguing that, absent a “legitimate business justification,” public policy should permit disclosure without regard for contractual promises not to disclose).

117. *Cf.* Polden, *supra* note 62, at 141 (arguing that in the antitrust context, courts should look to the purpose and effect of “the aggregation of restrictive covenants” in contracts).

118. This is widely accepted both historically and in the contemporary literature. *See* Blake, *supra* note 3, at 647–48; Hrdy & Seaman, *supra* note 8, at 683; Marx, *supra* note 15, at 698; *see also* Varadarajan, *supra* note 6, at 1577 (arguing that courts should be more skeptical of employer and consumer agreements concerning trade secrets).

119. Lobel, *supra* note 6, at 792 (detailing the suite of restrictive clauses at employers’ disposal); *see also supra* note 109 (explaining that restrictive covenants have a natural tendency to overprotect information, chilling more conduct than necessary).

120. Lobel, *supra* note 6, at 781–82 (explaining that restrictive covenants “silence employees” and “impede job mobility”).

workplaces.¹²¹ The effects created by the threat of enforcement are undesirable for employers as well. Firms benefit from fluid labor markets, which enhance their ability to hire prospective employees with substantial usable experience and knowledge from prior employment.¹²² Fastening such tight guardrails around economic mobility is thus undesirable normatively and should be an important consideration for courts determining the validity of a contractual restraint.¹²³

The pervasive use of contractual restraints in the workforce across industries results in a serious chilling effect for all employees.¹²⁴ Even if an agreement is not ultimately enforced, there is a considerable chill on a worker's ability to seek other jobs and to use their full knowledge and accumulated human capital. The chilling effect extends even to information that is not protectible as a trade secret due to the enlarged subject matter protectible under confidentiality agreements themselves.¹²⁵

The potential consequences for an employee who gets sued for breach of contract are so serious that the agreement can effectively sever knowledge and human capital from an employee for an indeterminate amount of time and with unlimited geographic scope.¹²⁶ Workers will typically face an uphill battle defending such claims against their employers in the first place, so it does not help that the law generously protects any information deemed "confidential" by the employer. Non-competes must be carefully tailored to be applicable to a limited geographic region, time period, and scope of employment, but other types of confidentiality agreements need no such limitations and are presumed reasonable on their face.¹²⁷ The employer can bring a litany of different legal theories in every lawsuit alongside their

121. Without safety valves for disclosure, secrecy can prevent whistleblowing activity on illegal and unethical conduct. See Bishara et al., *supra* note 61, at 23.

122. Labor market gains come in the form of efficient recruitment and employee sorting, candid feedback by employees which can lead to improved firm quality, and knowledge spread. Sockin et al., *supra* note 5, at 3–5.

123. For more on how reform proposals would work, see *infra* Part III.

124. See Lobel, *supra* note 6, at 790; see also Varadarajan, *supra* note 6, at 1565 (explaining that contractual restrictions chill the use of non-secret information and "broadly restrict employees' use of information learned during their employment," even information that is well-known across an industry).

125. Varadarajan, *supra* note 6, at 1564–66.

126. See Hrdy & Seaman, *supra* note 8, at 676–77 (suggesting that confidentiality agreements "effectively prevent[] employees from leaving and taking new jobs or starting their own companies" and "can theoretically last for the employer's entire lifetime"); Marx, *supra* note 15, at 697–98. Traditional economic and sociological theory presumed that a worker is inseparable from his or her skills and knowledge, which will transfer with them to new jobs in a frictionless labor market. *Id.* at 697 (citing Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, J. POL. ECON., Oct. 1962, at 9). However, firms may require post-employment restraints that effectively "separate workers from the use of their skills," creating "firm-specific human capital by denying workers the opportunity to apply those skills outside the firm." *Id.* at 698.

127. See *supra* Section I.B.1.

breach of contract claims (trade secret claims in state or federal court, and intellectual property claims in an appropriate case), which they frequently do.¹²⁸ Threatening several counts under different theories for the same alleged unlawful disclosure will often be enough for the employee to simply give in, either to settlement or demands for specific performance.¹²⁹

It has been taken for granted that confidentiality agreements do not have a significant and measurable impact. In fact, one justification for the use of non-competes is the theory that confidentiality agreements do not go far enough. NDAs and non-solicitation agreements, for example, are easily gamed because of the difficulties in gathering evidence that an employee violated them.¹³⁰ Some employers justify the use of non-competes on the premise that they are necessary to prevent employees from violating the terms of their NDAs, preventing the use of confidential information.¹³¹

Contrary to this received wisdom, tightly worded NDAs do work quite effectively at discouraging employees from leaving their jobs and from utilizing certain skills when they do change jobs.¹³² Regardless of whether they are ultimately enforceable, NDAs act as a “signal to employees that a range of knowledge, information, and speech is off-limits.”¹³³ Many companies take an expansive view on what constitutes confidential information or even a protectible trade secret, with some going so far as to claim corporate diversity information is a trade secret.¹³⁴ The chilling effect from the agreements depresses the spread of information about topics that are not protectible, such as salary information.¹³⁵ Like non-competes, confidentiality agreements “impede both internal speech and mobility in the market.”¹³⁶

The existence of confidentiality agreements chills employee choice in several ways. The employee may be wary of leaving and using their skills elsewhere if the employer has a reputation for litigious enforcement of its NDAs.¹³⁷ This is particularly true in more secretive professional industries

128. See Hrdy & Seaman, *supra* note 8, at 685; *supra* Section II.A.

129. Sometimes, the employer may only desire an injunction against further disclosure. The injunctive remedies available for trade secret violations are much stronger than for merely a breach of confidentiality. Hrdy & Seaman, *supra* note 8, at 687–88.

130. See Yirdaw, *supra* note 4, at 147.

131. See Marx, *supra* note 15, at 699.

132. See Lobel, *supra* note 6, at 790 (explaining how NDAs function as exit restrictions).

133. *Id.*

134. *Id.* at 790–91.

135. *Id.* at 790.

136. See *id.* at 791 (explaining that non-solicitation agreements “restrict[] exit and competition by stripping former employees of their professional network,” pre-innovation assignment agreements prevent employees from using ideas or knowledge beyond that covered as intellectual property).

137. Bast, *supra* note 69, at 642–43.

with occupations involving sophisticated business information.¹³⁸ Confidentiality agreements may cause a potential employer to not hire a particular employee.¹³⁹ When confidentiality agreements are presumptively enforceable and provide clear notice to prospective employers of the information deemed confidential, the prospective employer may pass on a candidate to avoid litigation risk.¹⁴⁰

C. *Negative Impacts on Equality*

Confidentiality agreement enforcement entrenches stratification in the workplace due to the unequal burden exit restrictions place on women and potentially on racial minority groups as well.¹⁴¹ Women are disproportionately impacted by restrictions because they are more likely to be geographically limited or acquiescent to the career demands of a spouse when in dual-career households.¹⁴² Couples where both spouses have professional careers often choose to prioritize the husband's career needs both "as a consequence of traditional gender norms" and as "rational decisions about earning power" due to the gender wage gap.¹⁴³ Women on average have fewer employers to choose from and possess lower wages and mobility.¹⁴⁴

While the connection between employee mobility and discrimination remains understudied, some evidence suggests there are also unequal effects on the basis of race.¹⁴⁵ Contractual restraints on employees are selectively enforced on the basis of race, and racial discrimination in general restricts job opportunities available to minority groups.¹⁴⁶ The maintenance of secrecy through NDAs and other agreements can prevent information about salaries, diversity, and patterns of harassment from being widely disseminated.¹⁴⁷

138. Blake, *supra* note 3, at 662 (noting that courts are more likely to uphold restraints on professionals with serious customer relationships like lawyers, doctors, architects, accounts, and dentists).

139. Bast, *supra* note 69, at 642.

140. *Id.* at 643.

141. Lobel, *supra* note 6, at 801–02.

142. *Id.* (noting that "studies of patterns of relocation of spouses with dual careers reveal the prioritization of husbands' careers").

143. *Id.* The gender wage gap has largely persisted over the years. For recent data, see Richard Fry & Carolina Aragão, *Gender Pay Gap in U.S. Has Narrowed Slightly over 2 Decades*, PEW RSCH. CTR. (Mar. 4, 2025), <https://www.pewresearch.org/short-reads/2025/03/04/gender-pay-gap-in-us-has-narrowed-slightly-over-2-decades/> [<https://perma.cc/GK99-F8N6>].

144. Lobel, *supra* note 6, at 801–02.

145. *Id.* at 802.

146. *Id.* at 805.

147. *Id.*

Existing inequalities on these metrics can lock in or “preserve discriminatory realities,” building on the economist Gary Becker’s argument that increased market competition should reduce market discrimination.¹⁴⁸ It follows, then, that increasing the mobility of employees should open up options and reduce the inequalities produced by discrimination.¹⁴⁹ Currently, firms that have harassment and discrimination issues are not held sufficiently accountable and workers facing discrimination face more difficulties in securing nondiscriminatory employment due to the barriers imposed by confidentiality.

At a higher level of abstraction, discriminatory effects on certain groups are natural outgrowths of the unequal conditions under which confidentiality agreements are formed. Harlan M. Blake stated that “[e]very postemployment restraint . . . has inevitable effects which in some degree oppose commonly shared community values.”¹⁵⁰ It is thought to be “distasteful” to permit a person to “barter away” their personal freedom, especially when there is no real equality of bargaining power between worker and employer.¹⁵¹ Restrictive employment covenants are unfair to workers in the sense that they put the “load of responsibility” on employees who wish to change jobs for any number of reasons wholly unrelated to the disclosure of their employer’s information.¹⁵² Such restraints can flatten a workers’ agency and ability to make a living as an individual—it is a peculiar and alienating thing for a worker to have their qualifications claimed as a human capital asset by their employer.¹⁵³

Overall, employers use restrictive contractual covenants to exercise inappropriate power over the labor market at the expense of workers. The ubiquity of strict employee confidentiality thus contributes to a system which produces an unhappy workforce subject to outsized control by employers. Failing to acknowledge these distortive workforce effects will only worsen inequality in labor markets and encourage conformity and silence. Meanwhile, confidentiality agreements do little to protect proprietary information in a way that matters for businesses.

148. *Id.* at 802 (citing GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 159 (2d ed. 1971)).

149. *See id.*

150. Blake, *supra* note 3, at 650.

151. *Id.*

152. Rolande Cuvillier, *No-Competition and Non-Disclosure Obligations: Bond or Bondage for the Employee?*, 115 INT’L LAB. REV. 193, 209 (1977).

153. *See id.*

D. The Need to Protect Business Information Does Not Justify Current Law

The most common argument in favor of restrictive contractual covenants is that they are a necessary evil, being the least costly device by which to promote business efficiency and human capital investment by firms.¹⁵⁴ This argument has “not proven sufficiently persuasive” because the burdens of restriction are borne disproportionately by workers themselves and are rarely, if ever, sufficiently outweighed by human capital investment by the employer.¹⁵⁵

First, most of the information covered by these agreements is beyond the scope of what is protectible as a trade secret and thus not of great business value. If the information deemed “confidential” is beyond the scope of trade secrecy, then it is necessarily knowledge of “general” character and has only a dubious claim to protection in the first place.¹⁵⁶ At worst, maximalist confidentiality protection provokes litigation over information containing minimal practical value, and at best, it creates an overly cautious workforce reluctant to fully utilize knowledge and skills learned through prior employment. The rules governing enforceability are thus allowing information to be consistently overprotected, which chills the spread of ideas across the economy.¹⁵⁷

Second, the most common legal standard governing the enforceability of agreements is so loose that it does not constitute a reliable bellwether for whether information is valuable or not. Firms are incentivized to maximize the scope of their confidentiality agreements because they can, not because the covered information is critical.¹⁵⁸ The protection of trade secrets is a legitimate and important business interest, but the use of employment contracts as conclusive evidence for whether something is confidential lends undue credibility to the firm’s determination. It is obvious that a business’s assertion of a privilege to particular information will sometimes be self-serving. The existence of a confidentiality agreement formed between an employer and employee under an atmosphere of unequal bargaining power does not justify a legal conclusion that the information is proprietary in nature.

154. Blake, *supra* note 3, at 651–52.

155. *Id.* at 652.

156. See Varadarajan, *supra* note 6, at 1564–66 (explaining that confidentiality provisions expand the degree of protectible information beyond the definition of trade secrets).

157. See *supra* Section II.B.

158. Perhaps that is why nearly ninety percent of firms use NDAs for their employees of all kinds, see *supra* note 60, and tend to include the whole suite of restrictive clauses for at least technical and professional workers, see *supra* note 14.

Third, the risks associated with information disclosure have been overstated while the costs of overreach have been understated.¹⁵⁹ It is true firms possess valuable information that must be protected to promote innovation and prevent excessive poaching by competitors; estimated losses from intellectual property theft, for example, number in the billions annually.¹⁶⁰ However, most extremely valuable confidential information (the disclosure of which results in significant revenue losses for firms) is heavily protected under existing trade secret or intellectual property law.¹⁶¹ This kind of information does not need additional protection by way of strict non-disclosure of all “confidential” subject matter for all employees. For the narrower category of information not qualifying as trade secrets where restriction is still justified, the changes proposed in this Note do not foreclose the use of confidentiality agreements tailored to prevent disclosure of protectible subject matter.¹⁶²

Fourth, the conventional belief that post-employment restraints are necessary because they encourage human capital investment by firms fails because even very pro-employer legal regimes cannot encourage a significant amount of investment. Firms still bear too much risk to engage in significant training and other human capital investment in their workforce because employees remain relatively mobile.¹⁶³ Significant investments in labor improvement become more worthwhile for employers as the employment commitment grows longer, eventually straddling the ethically

159. See Blake, *supra* note 3, at 652; Hrdy & Seaman, *supra* note 8, at 694–97 (noting policy problems including reduced mobility, competition, innovation and economic growth, and notice issues). Confidentiality agreements that cover “all or most of the information” employees possess as part of the scope of employment are not efficient because the employee is not on notice concerning what information is most important to keep confidential. *Id.* at 698. For opposing literature, see Bishara et al., *supra* note 61, at 22 (explaining that NDAs can be useful because “they can encourage information sharing between principals and their agents”); Fernando Barrios Aguirre, Diana Maritza Alvarez Ovalle, Nancy Milena Riveros Chávez & Carla Johana Martinez Garcia, *Open Innovation and Confidentiality Agreements as Key Factors of Innovative Performance in the Manufacturing and Service Industries*, 19 PLOS ONE, issue no. 5, May 2024, art. no. e0303802, at 10, <https://doi.org/10.1371/journal.pone.0303802> [<https://perma.cc/29V5-NWPY>] (research in Colombia suggesting that confidentiality agreements are “critical” to maximizing collaborative forms of innovation among cautious parties); see also Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87 (1993) (eclectic view arguing that allowing employees to bind themselves to multi-year contracts is preferable to strict non-compete agreements).

160. Bast, *supra* note 69, at 637.

161. *Id.* at 637–39 (describing some high-profile cases of intellectual property theft). Some famous examples in the 1990s include corporate spies working at Eastman Kodak Company, the Avery Dennison Corporation, and Microsoft. In all three instances chronicled by Bast, confidentiality agreements did not serve a pivotal role—enforcement was effectively executed through criminal laws involving trade secret theft (in the case of Avery Dennison and Kodak) and an antitrust lawsuit by the Department of Justice (in the case of Microsoft). *Id.* at 638.

162. See *infra* Section III.B.

163. See Blake, *supra* note 3, at 652.

fraught line with indentured servitude.¹⁶⁴ Thus, the “central rationale” of the holding in *Mitchel v. Reynolds* justifying the use of non-competes is based on the flawed premise that non-competes permit employers to “effectively transfer, and be paid for” the human capital that they produced.¹⁶⁵

To summarize, even if there are any substantial macroeconomic downsides to the approach endorsed by this Note, negative externalities flowing from reforms to the law of confidentiality agreements would be partially offset by gains in worker mobility, productivity, and increased information flows.¹⁶⁶ Moreover, confidential information that is not patentable, a trade secret, or proprietary in the business-to-business context is the least economically valuable category of information. The overprotection of information in confidentiality agreements is an unnecessary impediment in labor markets that makes the labor force less productive and competitive. If the chilling effect caused by these agreements were removed, technical and skilled workers would gain greater bargaining power and career flexibility.

Concerns about business incentives are best addressed under trade secret law (or intellectual property law) without strong built-in reliance on confidentiality agreements.¹⁶⁷ It is frequently said that confidentiality agreements are necessary because trade secret claims are hard to win—but this is basically an admission that confidentiality agreements are serving an inappropriate function for businesses, allowing them to win otherwise meritless trade secret claims. Businesses who suffer losses from trade secret theft and improper disclosures should have to stand on their own feet and litigate on the basis of a bona fide trade secret or intellectual property claim. If a court determines the claim lacks merit, it is transparently clear that the business should not prevail merely because it was wily enough to include draconian confidentiality provisions.

164. Great thinkers such as William Blackstone and John Locke have long wrestled with the distinction between contracted labor and involuntary servitude, but the question of multi-year contracts remain a gray area. See Wonnell, *supra* note 159, at 133–34.

165. Blake, *supra* note 3, at 652 & n.82.

166. Cf. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 577–78 (1999) (proposing that California’s ban on employee non-competes and the resulting ease of employee mobility is part of an advantageous legal framework that has made Silicon Valley’s economy and high levels of technological innovation possible); see also Varadarajan, *supra* note 6, at 1564 (noting the negative effects of confidentiality agreements on employee mobility and innovation).

167. For more specific proposals, see *infra* Section III.B.

III. REFORMING EXISTING LAW

A. *A Return to First Principles*

The law of restraints of trade did not begin with and should not end with the laissez-faire approach.¹⁶⁸ A pivotal moment in the common law was its misapprehension of the public policy problems raised by contract restrictions on employees in the late nineteenth century. The choice to distinguish post-employment restraints from other restraints on trade left worker protections somewhat in limbo, shielded only by a transmogrified version of non-compete doctrine based on laissez-faire freedom of contract principles. The law of post-employment restraints should revisit the central concern of *Mitchel v. Reynolds*: inequality of bargaining power.¹⁶⁹ An important historical force driving changes in the doctrine was a belief that massive transformations in industry “diminished the harshness of many [] restraints.”¹⁷⁰ With economic liberalism surging in this era,¹⁷¹ the traditional rationale *Mitchel* rested on did not seem as relevant to nineteenth-century courts.

As twentieth-century courts relaxed the radical free market standards generally practiced in the late nineteenth century, the standard was still deferential to restrictive employment covenants, except for overly restrictive non-competes.¹⁷² The modern approach has concededly corrected course with respect to non-competes but still maintains the laissez-faire approach to other restrictive covenants.¹⁷³ In short, the law has simply not yet caught up with the reality that confidentiality agreements are substantially similar to non-competes in many respects such that they merit treatment akin to non-competes.¹⁷⁴

Numerous social, demographic, and economic changes increased the mobility of skilled labor, such as rising educational attainment of the workforce, rising international competition on trade, and

168. See *supra* Section I.A.

169. See Blake, *supra* note 3, at 637.

170. *Id.* at 638.

171. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), *overruled by* *Lincoln Fed. Lab. Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

172. Blake, *supra* note 3, at 638.

173. The early cases did not consider confidentiality agreements like NDAs, which were mostly dismissed as relatively minor or ancillary restraints incomparable to non-competes. See *id.*

174. See *Hrdy & Seaman*, *supra* note 8, at 676 (suggesting that some confidentiality agreements act like non-competes and “raise many of the same issues”).

deindustrialization.¹⁷⁵ At the same time, the increasing supply of professional laborers and use of contractual tools by businesses to restrict their employees' abilities to change employment has put downward pressure on employee mobility.¹⁷⁶ The need for control and regulation of the workforce is perhaps a natural consequence of the fact that professional and technical workers became increasingly economically mobile.

Incentives in the market likely explain why firms maximize the competitive benefits from confidentiality provisions, exploiting the fundamental power imbalance with their employees. In an open labor market, it makes sense to use all legal means available to maximize comparative advantage and deny those same advantages to competitors, leading to undue pressure to restrict the use of information by employees post-termination as much as possible.¹⁷⁷ That imbalance leaves individual workers at a disadvantage in negotiation with firms over the terms of employment where the business has significant interests in protecting any potentially valuable information and discouraging employees from leaving for competitors.

The desire to regulate and structure the workforce in a manner which maximizes profitability is not beneficial in the long run for the economy or the public. For the various reasons argued, confidentiality restrictions ultimately cause more harm than good. Reorientation away from the traditional notions about the "social geometry of bargains" is needed in order to make contract law principles align once more with public policy.¹⁷⁸ Contrary to the presumption that contract principles are "fair" and "neutral" default rules, contract law constitutes an amalgamation of policy-based choices about who to imbue with bargaining power.¹⁷⁹ Most obviously, the power asymmetry inherent in contracts between a single employee and a

175. CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* 34–35 (2008) (noting the dramatic rise in levels of educational attainment in the U.S. population driving twentieth-century economic growth); David H. Autor, *Trade and Labor Markets: Lessons from China's Rise*, IZA WORLD OF LAB., Feb. 2018, art. no. 431, at 10. The literature on deindustrialization and offshoring generally focuses on the concentrated negative impact on certain labor markets that have significant "trade exposure" (often manufacturing industries). *Id.* This means that deindustrialization has also led to a relative advantage for non-trade exposed industries and for technical and professional workers, which in turn incentivizes educational attainment and puts upward pressure on the supply of professional labor.

176. See Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 961–62 (2019) (evidence suggesting relationship between constrained mobility and non-competes in many states).

177. See Bishara et al., *supra* note 61, at 23 ("It is understandable that a firm would want to protect its competitive advantage by limiting the use of its valuable business information by a former employee who moves to a competitor.").

178. See Britton-Purdy et al., *supra* note 19, at 1821 (quoting Georg Simmel, *The Number of Members as Determining the Sociological Form of the Group*, 8 AM. J. SOC. 1 (1902)).

179. See *id.*

large firm illustrates the weak points of the laissez-faire principles which underpin the freedom of contracting. The “freedom” to lock oneself into a perpetual confidentiality restriction conflicts with other positive freedoms, such as working productively in a calling of one’s choice.¹⁸⁰

B. Reform Proposals

There are several proposals in existing scholarship to curtail the reach of confidentiality agreements in various ways. The main pathways for reform all involve applying a default presumption against enforceability, an argument made by Camilla A. Hrdy and Christopher B. Seaman.¹⁸¹ The rule for validity could be more closely adapted to the rule used for non-competes. In some cases, courts could simply ask whether the provision is really a *de facto* non-compete.¹⁸² Alternatively, courts could hold that the only information protectible by NDAs, non-solicitation agreements, and similar provisions is information otherwise protectible as a trade secret.¹⁸³ To make such a rule effective, the existence of the NDA prohibiting disclosure of trade secrets should be regarded only as evidence the employer viewed the information as a trade secret, not conclusive evidence that a trade secret really exists. This type of reform would result in confidentiality provisions being invalidated entirely when their terms extend to information beyond the scope of protectible trade secrets, making restrictions on disclosure effectively coterminous with trade secret law.¹⁸⁴

Congress or the state legislatures could pass legislation in the spirit of the ill-fated FTC non-compete rule and declare confidentiality agreements presumptively unenforceable.¹⁸⁵ A similar degree of scrutiny used for non-competes could be applied to confidentiality agreements. To the extent that an NDA or similar contract provision limits disclosure of purely employment-related information, the agreement should be narrowly tailored in content matter, time, and geographic scope. Just as a non-compete still

180. Severe limitations on the ability to pursue work are a serious loss of the freedom to pursue one’s calling. *Cf.* Cuvillier, *supra* note 152, at 200 (“The right to earn a living would obviously be a mere parody of justice if it were interpreted to mean that the employee should accept any work whatsoever, that he should take a less responsible job, or even that he should renounce normal promotion prospects.” (internal quotation marks omitted)).

181. *See* Hrdy & Seaman, *supra* note 8, at 736–37.

182. *Id.* at 739.

183. *Id.* at 745–52.

184. *Id.* at 712–14; *see* Polden, *supra* note 62, at 141 (arguing that in the antitrust context, “[c]onfidentiality provisions are appropriate if an employer has intellectual property and trade secrets to protect from misappropriation by competitors. Non-solicitation provisions may be appropriate to prevent employees from soliciting customers to leave their current employer for a new venture”).

185. Congress could act under its antitrust and broader Commerce Clause authority, and state legislatures could modify the law of contracts in their respective states.

serves a business's interests despite its limitations, confidentiality agreements with such limitations will still provide firms with substantial commercial benefits without unduly restraining employees.

Finally, legislative reconsideration of trade secret law itself is appropriate. To truly address the idiosyncrasies which exist in the doctrine and its overlap with contract law, legal reform could achieve a more appropriate balance between the competing policy interests bound up in the protection of valuable corporate information. In a perfect world, Congress and the states would revisit all the relevant legal regimes and their complex intersections in an attempt to strike a more appropriate balance of interests.¹⁸⁶ Such a herculean endeavor would necessarily include reconsideration of the UTSA, the DTSA, and the relevant provisions of antitrust and contract law. It would be ideal to construct a comprehensive information protection regime that better protects the interests of employees in free and fair labor markets while privileging truly proprietary information possessed by firms. A smaller but more practical change Congress could effectuate is an amendment to the DTSA limiting remedies available to employers who prevail on their claims, as they have (perhaps unintentionally) done with respect to non-competes.¹⁸⁷

CONCLUSION

Confidentiality agreements create harms that are similar in kind to non-compete agreements, which some states have recognized.¹⁸⁸ The harms include reduced employee mobility, inflexible labor markets, and reduced employer-employee communication, which negatively affects employers.¹⁸⁹ Strict confidentiality provisions cause further stratification in the workforce and have unequal effects on employees across demographic groups, particularly with respect to gender and potentially race.¹⁹⁰ Most troublingly, the combination of severe contractual restrictions and the threat of trade secret infringement creates a supercharged chilling effect on employee behavior beyond the intended impact of each constituent enforcement

186. See Sandeen & Rowe, *supra* note 43, at 464–67 (discussing proposals for judicial reforms that address the role of trade secrets in non-compete enforcement). For an argument critical of the DTSA, see Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317 (2015).

187. See *supra* note 88 (with respect to injunctive relief for claims arising out of non-competes).

188. Hrdy & Seaman, *supra* note 8, at 713–14 (providing examples of state courts which have scrutinized confidentiality agreements more closely).

189. Sockin et al., *supra* note 5, at 3–6 (indicating that NDAs can create negative externalities for companies by suppressing information about lower quality firms); see *supra* Section II.B.

190. Lobel, *supra* note 6, at 801–05.

regime.¹⁹¹ The end result is a great amount of intended and unintended economic externalities not adequately justified by the business concerns that motivate confidentiality and trade secret law.

The current legal scheme overprotects information for the sole benefit of employers. The doctrine must adapt to modern changes in labor markets and the evolving techniques used in employment agreements to restrict workers, taking care to not fall into the trap of crediting economic efficiency above all else. Freeing employees from the straitjacket of confidentiality would unleash upward economic mobility, higher job satisfaction, and greater productivity for businesses.

*Jaden A. Lanza**

191. See Varadarajan, *supra* note 6, at 1563–64 (arguing that confidentiality agreements enlarge and expand trade secret law); Lobel, *supra* note 6, at 789–90 (explaining that NDAs have expanded beyond their traditionally defined subject matter at the same time as rising trade secrecy litigation, particularly since the DTSA’s passage).

* J.D. Candidate, Washington University School of Law (2026); B.A., Washington University (2023). I am immensely grateful to my fellow editors of the *Law Review* who helped improve this Note significantly—in particular, I want to thank John Day, Jocelyn Brooks, Kyle Kendall, Zachary Irovando, and Nathan Zou. As I near the end of my time in law school, I am also grateful for my partner, Laura, who was there for me from the beginning and has made all the hard work worth it.